87-643

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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OCTOBER 1987

QUESTIONS PRESENTED

1. Is it a search to require a person to strip to his underwear and expose his forearms?

2. Where a person has been deprived of his liberty without probable cause, may clothed parts of his body be examined and may he be compelled to furnish blood and urine samples?

INDEX

TABLE OF AUTHORITIES

Cases:

ases – Continued

onstitution and Statutes:

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Harold U. Repp respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on July 22, 1987.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review is reported at 23 M.J. 589 (A.F.C.M.R. 1986) and is reproduced in the appendix to this petition ("Pet. App.") at page 3a. The United States Court of Military Appeals initially denied review, 24 M.J. 339 (C.M.A. 1987), Pet. App. 2a, but, on reconsideration, granted review and summarily affirmed. 24 M.J. 447 (C.M.A. 1987), Pet. App. 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1985) and 10 U.S.C. § 867(h) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on July 22, 1987. On September 14, 1987, the Chief Justice granted an application for an extension of time in which to file a petition for certiorari.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 7 of the Uniform Code of Military Justice ("UCMJ") provides:

> Apprehension
>
> (a) Apprehension is the taking of a person into custody.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. 10 U.S.C. § 807 (1982).

Rule 312 of the Military Rules of Evidence, *Manual for Courts-Martial, United States, 1984* ("MCM, 1984"), Pt. III, Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984), provides, in pertinent part:

> **Rule 312. Body views and intrusions**
>
> (a) *General rule.* Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.
>
> (b) *Visual examination of the body.*
>
> (1) *Consensual.* Visual examination of the unclothed body may be made with the consent of the individual

subject to the inspection in accordance with Mil. R. Evid. 314(e).

(2) *Involuntary.* An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion *and* authorized under the following provisions of the Military Rules of Evidence: [a] inspections and inventories under Mil. R. Evid. 313; [b] searches under Mil. R. Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of crime is concealed on the body of the person to be searched; [c] searches within jails and similar facilities under Mil. R. Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel; [d] searches incident to lawful apprehension under Mil. R. Evid. 314(g); [e] emergency searches under Mil. R. Evid. 314(i); and [f] probable cause searches under Mil. R. Evid. 315. . . . (MCM, 1984, at III-10—(emphasis and bracketed lettering added).)

* * *

(d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable

fashion by a person with appropriate medical qualifications. (MCM, 1984, at III-11.)

Rule 314(i) of the Military Rules of Evidence provides:

(i) *Emergency searches to save life or for related purposes.* In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury. (MCM, 1984, at III-13.)

Rule 315 of the Military Rules of Evidence provides, in pertinent part:

Rule 315. Probable cause searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A "search warrant" is an express permission to search and seize issued by competent civilian authority.

* * *

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.

* * *

(f) *Basis for Search authorizations.*

(1) *Probable cause requirement.* A search authorization under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. . . .

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications.* There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communications with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruc-

tion, or concealment of the property or evidence sought;

* * *

(4) *Not required by the Constitution.* A search warrant or authorization is not required by the Constitution of the United States as applied to members of the armed forces. . . . (MCM, 1984, at III-14 to -15.)

STATEMENT OF THE CASE

Petitioner was convicted by an Air Force court-martial of use of heroin and sentenced to be confined for three years, to forfeit $1583 pay per month for 36 months, and to be dismissed from the service. The conviction rested on the results of urine and blood sampling that revealed the use of heroin. Unlike so much of the drug-related litigation that has recently clogged the federal and state courts, the laboratory results in this case were not the product of any random urinalysis program, but rather the result of the criminal investigative process that, properly or not, had come to focus specifically on Captain Repp.

The facts surrounding the government's acquisition of the incriminating evidence are largely undisputed, and were summarized by the Air Force Court of Military Review as follows:

> The evidence revealed that on 1 March 1985, civilian la nforcement officers were conducting a "stake-out" of the residence of a known heroin addict who was suspected of being a drug dealer. While the police were watching the house, approximately eight to ten individuals arrived and left shortly after completing a "transaction" of some type. Later, between [noon] and [1:00 p.m.], a bright red Corvette with Oregon tags arrived driven by an individual described as 6'2", slender with sandy brown hear and wearing a green military uniform, i.e., a "jump suit with colorful

patches on the shoulders." A short time thereafter using a warrant issued by a civilian magistrate, the residence was searched. Twenty-seven "balloons" of heroin, together with syringes and $6,000.00 in cash, were uncovered.

On 4 March, the civilian police told military investigators at George Air Force Base about the red corvette with Oregon tags driven by an individual who was apparently a servicemember. Later the car was identified as the [petitioner's]. On the afternoon of the next day, 5 March, the [petitioner] was taken from the squadron lounge to the Office of Special Investigations (OSI). There, the [petitioner] contends that while he was advised of his right to counsel and given codal warnings [under Article 31 of the UCMJ, 10 U.S.C. § 831 (1982)], he was not informed of the offense of which he was suspected. The [petitioner] further states he asked for a lawyer "three of four times," but none was provided. What occurs next is contested. The [petitioner] maintains he was required to remove his flight suit leaving him in his underwear while his arms were examined. The investigator who conducted the body view stated that initially the [petitioner] was asked only to unzip the flight suit to the waist. In any event, needle marks were found on the [petitioner's] right and left forearms and on his ankles. At this point he was asked to disrobe completely and his entire body was examined and photographed. The record is clear that the [petitioner] did not consent to this procedure.

Later, at approximately [6:30 p.m.] the [petitioner] was taken to the emergency room of the base hospital and examined by a physician. The examination disclosed approximately ten puncture marks on the hands, forearms and ankles that were consistent with a hypodermic needle injection. The [petitioner] also

> manifested capillary blood pressure and pulse changes which are symptomatic of narcotic withdrawal.
>
> That evening, pursuant to a search authorization, the [petitioner] was required to provide a urine sample and permit a medical technician to withdraw blood. Laboratory tests revealed the presence of opiates. 23 M.J. at 590-91.

At trial, the defense moved to suppress the evidence of the puncture marks observed during the body view. R. 25ff. The military judge denied the motion, finding that "arms are public" and not protected by any reasonable expectation of privacy. R. 72. A related motion to suppress all evidence found as a result of the arm examination was also denied on the ground that the initial view was proper. R. 73.

On mandatory review, the Court of Military Review affirmed. While it did not resolve the dispute over whether the OSI investigator asked petitioner to remove his flightsuit entirely or merely unzip it to the waist, this factual question is of no moment since, even by the investigator's testimony, the Fourth Amendment was violated.

The court disposed of petitioner's constitutional objections by a combination of devices. First, it found that because he might have chosen to wear a short-sleeved shirt rather than a long-sleeved flightsuit,[1] he had no protected privacy interest in his forearms. 23 M.J. at 591-92. Accordingly, it sidestepped the Fourth Amendment by concluding that the view of petitioner's forearms was

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[1] The flightsuit was lawful apparel under the Air Force's uniform regulation. It would have violated the regulation to have worn it with rolled up sleeves. R. 42; *see generally Goldman v. Weinberger*, 475 U.S. 503 (1986). Petitioner was also ordered to take off the flight jacket he was wearing over the flightsuit. R. 37.

simply not a search. In doing so, it treated as mutually exclusive (1) "searches" within the meaning of the Fourth Amendment and (2) "visual examinations" under Mil. R. Evid. 312. 23 M.J. at 592.

Second, the court held that petitioner was under arrest ("apprehended" in military legal parlance). *Id.*[2] Finding that petitioner's apprehension was based on probable cause, it concluded that the extraction of petitioner's blood and urine was proper under a military search authorization. *Id.* at 593.

Finally, the court concluded that the OSI investigators were within their rights in continuing their visual examination of petitioner's body after finding needle marks. *Id.*

The findings of guilt and the sentence were affirmed.

The Court of Military Appeals had discretionary authority to review the case. UCMJ Art. 67(b)(3), 10 U.S.C. § 867(b)(3) (Supp. III 1985). It initially denied review, Pet. App. 2a, but, on reconsideration, summarily affirmed. Pet. App. 1a.[3]

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[2] *See* UCMJ Art. 7(a) *supra*. "Apprehension is the taking of a person into custody." Rule for Courts-Martial 302(a)(1), MCM, 1984, at II-17. It is the equivalent of "arrest" in civilian terminology, and "must be based on probable cause." Discussion of R.C.M. 302(a)(1), MCM, 1984, at II-17.

[3] Under the Military Justice Act of 1983, defendants may seek certiorari only if the Court of Military Appeals grants discretionary review. 10 U.S.C. § 867(h)(1) (Supp. III 1985). That court has declined to promulgate a rule setting forth the considerations it applies in deciding whether to grant review, *cf.* S.Ct.R. 17, but has apparently been sensitive to the fact that a denial of review (unlike a summary affirmance) precludes direct review in this Court. The summary affirmance in this case was in response to petitioner's request that if the Court of Military Appeals did not grant plenary review, it should at least summarily affirm in order to permit him to seek a writ of certiorari. It is regrettable that Congress has limited military accuseds' access to this Court far more strictly than for criminal defendants in the state or Article III courts, but it is at least commendable that the court below has found a way to reduce the potential for unfairness. The fact

REASONS FOR GRANTING THE WRIT

A variety of factors join together to discourage the review of courts-martial in this Court. Some of these are statutory, some are doctrinal, while some are probably only subliminal. For example, Congress has placed limits on the certiorari jurisdiction with respect to courts-martial that are different in kind from those applicable to other types of criminal conviction. Unlike convictions in the district courts,[4] not every court-martial conviction can be the subject of a certiorari petition, and unlike cases arising in the state courts, the writ of certiorari runs only to the Court of Military Appeals (as opposed to the "highest court of a State in which a decision could be had").[5]

Doctrinally, of course, the cases stress that "the military is, by necessity, a specialized society separate from civilian society."[6]

And on the subliminal level, factors such as the relative unfamiliarity of military law, the government's quickly established pattern of implicitly disparaging military certiorari petitions by waiving response, and even the use of special ways to write things like dates and times (not to mention all the acronyms) probably have a subtle effect on the availability of review here.

As a result, it is not surprising that in the more than three years since Congress expanded the certiorari jurisdiction to permit direct review of some court-martial convic-

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that the Court of Military Appeals acted summarily should make no more difference, from the standpoint of certworthiness, than if the case had arisen in a state court and the highest court of the state had denied discretionary review.

[4] *See* 28 U.S.C. §§ 1291-92 (1982).

[5] 28 U.S.C. § 1257 (1982).

[6] *E.g., Parker v. Levy,* 417 U.S. 733, 743 (1974).

tions, of the scores of military certiorari petitions,[7] only two led to grants of certiorari. One case was summarily vacated and remanded for consideration in light of an intervening decision of this Court,[8] and the other, *Solorio v. United States,* 107 S. Ct. 2924 (1987), was set down for plenary briefing and argument. All other petitions that have been acted on were denied, presumably because the issues presented were, in most cases deemed to be peculiar to the military setting. On these data it would not be unreasonable to fear that cases coming from the Court of Military Appeals may be relegated to the status of FELA or patent cases from the standpoint of their practical eligibility for certiorari.

Mindful as we are of the difficulty *any* petitioner faces in obtaining a grant of certiorari in a criminal case, we submit that it is urgent that the access of servicemen and -women to this Court not be confined—or seen to be confined—to those rare cases in which the Court is disposed to reconsider one of its pre-1984 precedents in the military area or in which an intervening decision here directly undermines a decision of the Court of Military Appeals. Such a restriction, coming on top of the already narrow terms of the congressional grant, would make that grant a hollow promise of equal appellate justice for the millions of military personnel, especially now that the subject matter jurisdiction of courts-martial is no longer limited to offenses that are service-connected.[9]

The case at bar involves neither of the exceptional circumstances that account for the two prior grants in military cases, but rather calls for an exercise of this

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[7] As of October 15, 1987, 70 military certiorari petitions had been filed.

[8] *United States v. Goodson,* 471 U.S. 1063 (1985), *on remand,* 22 M.J. 22 (C.M.A. 1986) (per curiam), *on further remand,* 22 M.J. 947 (A.C.M.R. 1986).

[9] *Solorio v. United States, supra.*

Court's usual Rule 17 criteria.[10] Even if the armed forces were treated as analogous to the District of Columbia for purposes of that rule,[11] this should still be the next UCMJ case in which plenary review is granted because it involves an offense not peculiar to the military and egregious error on recurring and important issues that are every bit as likely to arise in a civilian context.

In the discussion that follows, the steps in the progressive abrogation of petitioner's Fourth Amendment rights may, for convenience, be organized as follows:

Step 1. Surveillance of addict's house
Step 2. The visit to OSI
Step 3. Compulsory strip to underwear and display of forearms at OSI
Step 4. Compulsory complete disrobing and photographing at OSI
Step 5. Examination by physician at hospital
Step 6. Issuance of search authorization
Step 7. Compulsory production of urine sample and extraction of blood
Step 8. Apprehension

This sequence of events is a textbook illustration of official disregard for the protections afforded against unreasonable searches and, seizures under both the Constitution and military law. The evidence on which petitioner's conviction rests was obtained at Step 7. Since, however, that step was infected by constitutional errors that occurred earlier in the process, the Step 7 evidence was tainted and, under time-honored principles, should have been suppressed.[12] In short, it is our submission that the

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[10] *See* 129 Cong. Rec. S16837 (daily ed. Nov. 18, 1983) (statement of Sen. Kennedy) (discussing criteria for certiorari in military cases).

[11] *See* Boskey & Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals,* 102 F.R.D. 329, 333 (1984).

[12] *Wong Sun v. United States,* 371 U.S. 471 (1963). Petitioner did not challenge the probable cause for the search authorization *eo nomine*, but his two motions to suppress unmistakably put in issue the

examination of petitioner's forearms (Step 3) was a search, but was not incident to an arrest, since petitioner was not arrested until many hours later (Step 8), or if it was, the arrest was not based on probable cause (Step 1).[13] It was not required by exigent circumstances since needle marks do not disappear so quickly as to permit the authorities to dispense with the warrant requirement.[14]

A civilian search warrant was never issued as to petitioner, and a military search authorization was not obtained until well after Step 3. It has never been contended that the forearm examination was a military "inspection" or "inventory";[15] a prison, border or entry-on-installation search;[16] or performed for medical or emergency purposes.[17] Nor did the government contend that time[18] or communications problems made it impossible to obtain the necessary search authorization.[19]

None of the requirements of Rule 312 of the Military Rules of Evidence for an involuntary body view was satisfied. Those rules were promulgated by Executive

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factual predicate for that authorization. R.25, 73. A third motion addressed specifically to the search authorization would have been an exercise in futility, since the trial court had already refused to suppress the evidence obtained by OSI prior to issuance of the search authorization. Hence, contrary to the implication in the Court of Military Review's opinion, 23 M.J. at 593, no waiver occurred.

[13] Mere presence on premises where a narcotics offense has occurred, or being in the presence of a narcotics offender, is not probable cause to arrest. *E.g.*, *People v. Govea*, 45 Cal. Rptr. 253, 266 (1st Dist. 1965). *See generally* Point II *infra.*

[14] The government had the burden of showing that needle marks are so evanescent as to require action without a warrant or search authorization. Its medical witness testified that healing could take up to ten days. R. 307, 314.

[15] Mil. R. Evid. 312(b)(2), 313.

[16] Mil. R. Evid. 312(b)(2), 314(b)-(c), (h).

[17] Mil. R. Evid. 312(b)(2), 314(i).

[18] Mil. R. Evid. 315(g)(1).

[19] Mil. R. Evid. 315(g)(2).

Order, and have the force of law.[20] All evidence that resulted from Step 3 should therefore have been suppressed. In addition, as we explain in Point II, there was no probable cause to arrest petitioner in the first place, and everything that flowed from his being summoned to OSI should have been suppressed.

I.

A PERSON WHO WEARS A LONG-SLEEVED GARMENT HAS A REASONABLE EXPECTATION OF PRIVACY IN HIS FOREARMS

The holding of the trial judge and the Court of Military Review that examination of the forearms of a person who is wearing a long-sleeved garment is not a search is plainly wrong. Personal autonomy has not so atrophied that the state may take a peek at parts of the body that a normal human being lawfully chooses to cover at the time. People wear short-sleeved garments day in and day out when in hot climates, or on occasion in temperate ones, but the choice is for them to make. A person who jogs, works out or plays basketball in t-shirt and shorts does not thereby consent to have the government examine his arms and legs when he or she is wearing a business suit or dress.

Like the proverbial "glass that is half full," choosing to expose certain parts of one's body is also—and necessarily—a choice *not* to expose others. Whether an individual has a reasonable expectation of privacy[21] in the clothed portions is a matter of personal choice which the law must honor if it is "one that society is prepared to accept as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). There is no basis for

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[20] *Levy v. Dillon*, 286 F. Supp. 593, 596 (D. Kans. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969); *see generally Service v. Dulles*, 354 U.S. 363, 388 (1957) (agency bound by own regulations).

[21] The reasonable expectation of privacy test has been expressly adopted by the President for use in courts-martial. Mil. R. Evid. 311(a)(2), MCM, 1984, at III-8.

concluding that petitioner's choice here was "one that society is [un]prepared to accept as reasonable." Indeed, to the extent that the Air Force carefully regulates uniforms, the fact that petitioner's flightsuit was appropriately and lawfully worn and had to be worn with the sleeves down, R. 42, shows that his choice of clothing was reasonable[22] and his expectation of privacy in his forearms well-founded.

The error below springs from a confusion of *modesty* with *privacy*. In contemporary society, the law may demand the former but the Constitution protects the latter. That government conduct does not offend notions of modesty says nothing about whether it contravenes reasonable expectations of privacy.

Expectations of privacy are ambulatory and vary with the choice of dress made by the individual. As a result, what petitioner *might have worn* or been required to wear is of no moment, and to focus on it is to reverse the polarity of Justice Harlan's formulation of the standard. The military may, to be sure, require an individual to wear a particular kind of uniform,[23] but this petitioner's apparel was a lawful article of clothing at the time and in the circumstances of his presence at the OSI office, and the government neither claimed nor proved otherwise.

The lower courts have frequently dealt with cases in which needle marks have been observed on people's arms, but many of the cases are inapposite. For example, to the extent that they involve people wearing short-sleeved garments,[24] the individual has placed his arms on display.

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[22] The search occurred in March in a cold frame building in which the heat was inoperative. R. 37.

[23] *Goldman v. Weinberger, supra.*

[24] *E.g., People v. Rios*, 46 Cal.2d 297, 294 P.2d 39, 40 (1956) (en banc) (Traynor, J.). In *State v. Jackson*, 29 Wis.2d 225, 227, 138 N.W.2d 260, 262 (1965), forearm needle marks were observed because the suspect was wearing a nightgown at the time of the arrest.

Cases involving parolee searches[25] or border searches are equally inapposite, although the fact that arm views have been defended as border *searches* certainly suggests that the courts have thought of these examinations *as searches.*[26]

The decision below conflicts with the decision of the Supreme Court of Wisconsin in *State v. Brown,* 25 Wis.2d 413, 130 N.W.2d 760, 763 (1964), where the court said:

> If the police removed the defendant's coat or his shirt in order to discover the needle marks without consent of the defendant, such action would constitute an illegal search of the person and would be subject to the rule of [an earlier Wisconsin case that prohibited the police from trailing a suspect based on a traffic offense]. *What is in plain sight they may look at, what is hidden or covered is verboten.* (Emphasis added.)

Similarly, in *People v. Ferguson,* 214 Cal.App.2d 772, 29 Cal.Rptr. 691, 694 (2d Dist. 1963), the court treated the police's observation of needle marks as a search, and noted the state's concession that no case had been found involving warrantless arrest based solely on the observation of needle marks.

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[25] *United States v. Thomas,* 729 F.2d 120, 122-23 (2d Cir.) (2-1), *cert. denied,* 469 U.S. 846 (1984) (implying consent to search and "unique relationship of the parole officer and the parolee").

[26] *Compare United States v. Murphree,* 497 F.2d 395, 396-97 (9th Cir.), *cert. denied,* 419 U.S. 863 (1974), *with Marsh v. United States,* 344 F.2d 317, 323-25 (5th Cir. 1965) (excluding evidence of needle marks observed by constable on tip from Customs agent); *cf. United States v. Palmer,* 575 F.2d 721 (9th Cir. 1978) (border search; lifting up dress). Similarly, in *Brooks v. State,* 13 Md.App. 151, 282 A.2d 516, 521 (1971), an examination of a person's arms for needle marks after a narcotics arrest was upheld on the theory that it was a search incident to lawful arrest, not that it was not a search at all.

The issue was also presented to the Fifth Circuit in *Marsh v. United States, supra note 26,* where the court treated a constable's observation of needle marks as a search, and invalidated it as the result of an illegal border search. In *United States v. Medina-Flores,* 477 F.2d 225 (5th Cir. 1973), the same court found it unnecessary to decide whether a view taken of a defendant's arms was an illegal search. *Id.* at 228.

On the other hand, in *Commonwealth v. Stickle,* 484 Pa. 89, 398 A.2d 957 (1979), an examination of an arrested person's arms to determine the age of burn scars was held not to be a search.

The lower courts have also divided on the related question whether it is a search for examine a person's hands under an ultraviolet light.[27]

The frequency with which issues concerning the examination of arms have arisen in the context of narcotics prosecutions indicates that the lower courts and law enforcement authorities would benefit from guidance from the Court in this area.

Arizona v. Hicks, 107 S.Ct. 1149 (1987), furnishes strong support for petitioner's position as to how the forearms issue ought to be resolved. In that case, the Court concluded that a separate search occurred when police executing a search warrant moved stereo equipment for the purpose of reading and recording serial numbers. *Id.* at 1152-53. One would certainly think that the privacy interest of an individual in those portions of his body he

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[27] *Compare, e.g., United States v. Keenan,* 496 F.2d 181 (1st Cir. 1974), *with United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968); *Williams v. City of Lancaster, Pennsylvania,* 639 F. Supp. 377, 381-82 (E.D. Pa. 1986) ("no reasonable expectation of privacy regarding the surface of his hands, which were exposed to the view of all about him"; *held,* not a search); *People v. Garcia,* 7 Cal.App.3d 314, 320, 86 Cal.Rptr. 628, 631 (2d Dist. 1970) (observation of needle marks on hands in plain sight *held* not a search).

chooses to clothe is at least as worthy of legal recognition as his interest in numbers marked on his stereo set. If moving a turntable triggers the Fourth Amendment, it would be anomalous, to say the least, to hold that forcing someone to roll up his sleeves, take off his long-sleeved shirt, or, as here, remove his long-sleeved flightsuit, in no way trenched on reasonable privacy expectations.

To the extent, therefore, that the courts below may have implicitly analogized the viewing of petitioner's forearms to a plain view search under *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the fact that his clothing had to be moved, rolled up or removed brings the case into conflict with *Hicks,* and requires, first, that the issue be analyzed *as a search,* and second, that there be probable cause or exigent circumstances not here present.

The case does not call upon the Court to provide a Fourth Amendment fashion guide, although some bright lines seem feasible and appropriate. For example, body cavities and the portion of the body that lies beneath the intact skin certainly involve reasonable expectations of privacy,[28] as would parts of the body that state indecent exposure laws require to be clothed.[29]

Conversely, a person wearing a mask in violation of the Ku Klux Klan Act, 42 U.S.C. § 1985(3) (1982), or an analogous statute[30] would seemingly would not have such

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[28] *E.g., Schmerber v. California,* 384 U.S. 757 (1966); *Rochin v. California,* 342 U.S. 175 (1951); *cf. Cupp v. Murphy,* 412 U.S. 291 (1973) (scraping under fingernails).

[29] *E.g.,* D.C. Code § 22-1112 (1981); *Duvallon v. District of Columbia,* 515 A.2d 724 (D.C. App. 1986); *DeWeese v. Town of Palm Beach,* 616 F. Supp. 971 (S.D. Fla. 1985). Military law also recognizes the offense of indecent exposure. MCM, 1984, ¶ 88, at IV-130.

[30] *E.g.,* D.C. Code § 22-3112.3 (Cum. Supp. 1987); Va. Code § 18.2-422 (Cum. Supp. 1987); S.C. Code Ann. § 16-7-110 (Law. Co-op. 1976); *see generally* Annot., 2 A.L.R. 4th 1241 (1980); *see, e.g.,* N.Y. Times, Oct. 8, 1987, at A20, col. 1 (indictment of cadets at The Citadel for wearing masks in racial hazing incident).

an expectation in the circumstances set forth in the statute.[31]

Areas where society including the military recognizes personal autonomy in clothing, such as heads that may or may not be covered, hands that may or may not be gloved, or sleeves that may be long or short fall in the broad middle ground between the mandatory and the prohibited. What seems clear is that an intrusion on this zone of autonomy cannot be upheld on the basis of what an individual might have worn as opposed to what he actually wore.

For these reasons, OSI's examination of petitioner's forearms, and all that followed from that examination, should have been suppressed.

II.

MERELY BEING SEEN APPROACHING A TRAILER FOUND TO BE THE SCENE OF DRUG TRAFFICKING IS NOT PROBABLE CAUSE TO ARREST, SEARCH, OR COMPEL THE PRODUCTION OF URINE AND BLOOD SAMPLES

In addition to the fact that OSI had no right to compel petitioner to display his forearms, there was no probable cause to summon him to the OSI office in the first place. Because the interaction with OSI – however it is labeled – was unwarranted, all the evidence resulting from the forearm examination (Step 3), compulsory disrobing (Step 4), and examination by the physician (Step 5), was improperly received. Although the compulsory blood and urine samples (Step 7) were obtained with a search authorization (Step 6), that authorization was predicated on the information unconstitutionally obtained in Steps 2-5. Hence, the results of those tests should have been suppressed as well.

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[31] Presumably, a person who wears headgear in a courtroom would also have no reasonable expectation of privacy in the part covered. The precise issue appears not to have been litigated. *Cf. McMillan v. State*, 258 Md. 147, 265 A.2d 453 (1970); *Close-It Enterprises v. Weinberger*, 64 A.D.2d 686, 407 N.Y.S.2d 587 (2d Dep't 1978); *In re Palmer*, 120 R.I. 250, 386 A.2d 1112 (1978).

Although the decision of the Court of Military Review does not make the point clear, petitioner was not apprehended until Step 8. Hence, none of the prior invasions of his rights can be justified as having been incident to a lawful arrest.

Throughout the suppression hearing, neither side contended that Captain Repp had been apprehended prior to Step 8. Rather, the parties took the position that he had merely been detained. Defense counsel carefully described Captain Repp's status as "detention, not apprehension." R. 25, "specifically to rule out any notion that a search incident to apprehension permissibly occurred, even in the absence of a search warrant." R.26; *see also* R. 62, 69. The prosecutor noted his "total agreement" with the defense's statement of the case with specific exceptions not here relevant, R. 29, describing the parties' positions as a "stipulation." R. 31. The government was afforded an opportunity to offer evidence on those matters with respect to which it disagreed with the defense, R. 32, but offered nothing to show petitioner had been apprehended prior to Step 8. The key government witness testified that petitioner had been "detained by another investigator and a special agent and brought into [OSI's] office." R. 33. Captain Repp was informed he was being detained. R. 35.

To the extent that the Court of Military Review chose to disregard the parties' agreement on this aspect of the case, its decision—including what we assume was an alternative holding that probable cause existed to apprehend, 23 M.J. at 593—is clearly erroneous.

The difference between a detention and an apprehension is critical from the standpoint of the lawfulness of the successive searches. As the official Discussion of R.C.M. 302(1) explains,

> [a]n investigative detention may be made on less than probable cause (*see* Mil. R. Evid. 314(f)), and normally involves a relatively short period of custody. Furthermore, an extensive search of the person is not authorized incident to an investigative detention, as it

> is with an apprehension. *See* Mil. R. Evid. 314(f) and (g). This rule does not affect any seizure of the person less severe than apprehension. MCM, 1984, at II-17.

Either petitioner was detained or he was apprehended. If the former, OSI did not have authority under the military's own rules to conduct the search they conducted. If the latter, it was an unlawful apprehension because it was not based on probable cause. Merely calling a single time[32] at premises owned by another which prove to be the site of drug trafficking did not furnish probable cause to believe, four days later, that petitioner himself had committed an offense. Indeed, petitioner himself had not been identified, but—at most—only his car. The evidence confirmed that the driver of the Corvette never entered the trailer, but merely knocked on the door of the trailer and called the occupant's name but never talked to anyone there, and, unlike other persons who had been seen that day by the police "stakeout," R. 230, engaged in no transaction with anyone before driving off. R. 240, 248-49.

This is far too slender a reed on which to predicate an arrest incident to which a person may be forced to undress. *E.g., Ybarra v. Illinois,* 444 U.S. 85 (1979) (mere propinquity to suspect persons or premises insufficient); *United States v. Di Re,* 332 U.S. 581 (1948); *see generally* 2 W. LaFave, *Search and Seizure, supra,* § 3.6(c).[33] These facts did not add up to probable cause.

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[32] *See generally* 2 W. LaFave, *Search and Seizure* § 3.6(c), at 56-57 (2d ed. 1987) (collecting cases).

[33] *See, e.g., United States v. Winn,* 544 F.2d 786 (5th Cir. 1977) (no probable cause based solely on prior association with occupant of premises where marijuana found in plain view, where defendant not present at time of crime).

CONCLUSION

The questions presented are genuinely important and affect not only the millions of Americans serving in the armed forces[34]—reason enough to grant review—but the rest of us as well. The cases are divided on whether an inspection of forearms is even a search and the decision below reflects, on this and the second question presented, a profound misapprehension of Fourth Amendment teaching. For all these reasons, the petition for a writ of certiorari should be granted.

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OCTOBER 1987

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[34] Over 2.1 million persons are on active duty. The UCMJ also applies to, among others, the numerous retired regulars, 10 U.S.C. § 802(a)(4) (1982); *McCarty v. McCarty*, 453 U.S. 210, 221-222 (1981), and drilling reservists. 10 U.S.C.A. § 802(a)(3) (West. Supp. 1987).

APPENDIX

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 56577/AF
CMR Dkt. No. 25211

UNITED STATES, APPELLEE

v.

HAROLD U. REPP (179-40-2426), APPELLANT

ORDER

On consideration of appellant's motion to file petition for reconsideration out of time and petition for reconsideration, it is, by the Court, this 22nd day of July, 1987,

ORDERED:

That the motion to file petition for reconsideration out of time is hereby granted;

That the petition is granted; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

Thursday, May 28, 1987
87-161

ORDERS DENYING PETITION FOR REVIEW

No. 56577/AF U.S. v. Harold U. Repp. CMR 25211.

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW.

ACM 25211.

UNITED STATES

v.

CAPTAIN HAROLD U. REPP, 179-40-2426
FV, UNITED STATES AIR FORCE.

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6 Oct. 1986.

DECISION

HODGSON, Chief Judge:

The case before us is one of first impression and involves evidence obtained from a body view. The applicable evidentiary rule states:

> RULE 312. BODY VIEWS AND INTRUSIONS
>
> (a) GENERAL RULE. Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.
>
> (b) VISUAL EXAMINATION OF THE BODY
>
> * * * * * *
>
> (2) INVOLUNTARY. An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in a reasonable fashion and authorized under the following provisions of the Military Rules of Evidence: . . . . *searches incident to*

lawful apprehension under Mil.R.Evid. 314(g) [Emphasis added].

* * * * * *

(d) EXTRACTION OF BODY FLUIDS. Non-consensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to search warrant or a search authorization under Mil.R.Evid. 315. . . . Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

Mil.R.Evid. 312 has no counterpart in the Federal Rules of Evidence and it represents an attempt by the drafters of the Military Rules of Evidence to merge the prior case law touching on self-incrimination[1] with the right to freedom from unreasonable searches.

I

The appellant is a rated Air Force officer who stands convicted of using heroin. On appeal, as at trial, he challenges the methods by which his heroin use was discovered. In general the essential facts are undisputed. The evidence revealed that on 1 March 1985, civilian law enforcement officers were conducting a "stake-out" of the residence of a known heroin addict who was suspected of being a drug dealer. While the police were watching the house, approximately eight to ten individuals arrived and left shortly after completing a "transaction" of some type.

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[1] Historically, under both civilian and military law, a suspect may be compelled to perform such acts as trim or grow a beard, try on clothes, submit to fingerprinting or exhibit scars. M.C.M.1969 (Rev.), para. 150(b); *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. (1953) and cases cited therein. Such acts were viewed as not involving self-incrimination.

Later, between 1200 and 1300 hours, a bright red Corvette with Oregon tags arrived driven by an individual described as 6'2", slender with sandy brown hair and wearing a green military uniform, i.e., a "jump suit with colorful patches on the shoulders." He stayed a few minutes and left. A short time thereafter using a warrant issued by a civilian magistrate, the residence was searched. Twenty-seven "balloons" of heroin, together with syringes and $6,000.00 in cash, were uncovered.

On 4 March, the civilian police told military investigators at George Air Force Base about the red Corvette with Oregon tags driven by an individual who was apparently a servicemember. Later the car was identified as the appellant's. On the afternoon of the next day, 5 March, the appellant was taken from the squadron lounge to the Office of Special Investigations (OSI). There, the appellant contends that while he was advised of his right to counsel and given codal warnings, he was not informed of the offense of which he was suspected. The appellant further states he asked for a lawyer "three or four times," but none was provided. What occurred next is contested. The appellant maintains he was required to remove his flight suit leaving him in his underwear while his arms were examined. The investigator who conducted the body view stated that initially the appellant was asked only to unzip the flight suit to the waist. In any event, needle marks were found on the appellant's right and left forarms and on his ankles. At this point he was asked to disrobe completely and his entire body was examined and photographed. The record is clear that the appellant did not consent to this procedure.

Later, at approximately 1830 hours the appellant was taken to the emergency room of the base hospital and examined by a physician. This examination disclosed approximately ten puncture marks on the hands, forearms and ankles that were consistent with a hypodermic needle

injection. The appellant also manifested capillary changes, i.e., eyes abnormally large, and blood pressure and pulse changes which are symptomatic of narcotic withdrawal.

That evening, pursuant to a search authorization, the appellant was required to provide a urine sample and permit a medical technician to withdraw blood. Laboratory tests on each specimen revealed the presence of opiates.

II

The appellant first urges that he had a reasonable expectation of privacy in his forearms which he chose to shield from public view by wearing a long sleeve garment. We note, however, the decision of what clothing to wear was not his. He was required to wear the standard Air Force flying uniform. He argues that requiring him to expose his arms was just as much a search as asking him to empty his pockets, a postition held in *United States v. Kinane,* 1 M.J. 309 (C.M.A.1976). In that case the court held that a detective's action in demanding that an accused remove items from his pockets constituted a "search" within the ambit of the Fourth Amendment. He also directs our attention to *State v. Brown,* 25 Wis.2d 413, 130 N.W.2d 760 (1964), wherein the Wisconsin Supreme Court stated that looking for needle marks on the arms of a suspect was a search within the meaning of the term.

[1] The editorial comment to Rule 312 opines that the rule applies a sliding scale to body evidence problems – the greater the Fourth Amendment intrusion, the broader the protection. At the least intrusive end of the scale are those slight intrusions such as visual examinations of the body. At the other end are gross intrusions, like surgical procedures to recover evidence. S. Saltzburg, L. Schinasi and D. Schlueter, *Military Rules of Evidence,* 2d ed., p. 221. As we stated earlier, Rule 312 has no civilian equivalent, but decisions from state and federal appellate courts can give guidance as to what is a minimal intrusion. The

Supreme Court of Georgia held that swabbing a suspect's hands to obtain gunpowder residue was not a search nor did it amount to self-incrimination. *Strickland v. State,* 247 Ga. 219, 275 S.E.2d 29 (1981). In a similar case the New York Court of Appeals in *People v. Wesley,* 88 Misc.2d 177, 387 N.Y.S.2d 34 (N.Y.Sup.1976), stated that shining an ultra-violet light on an accused's hands was not a search. In a recent New Jersey case the appellant argued that the police had no right to "visually inspect" the soles of his shoes which were concealed from view because he was standing. There the Appellate Division of the New Jersey Superior Court ruled that for a visual inspection to constitute a "search", the accused must have had a reasonable expectation of privacy in the area searched. The court found only a minimal expectation in the soles of shoes. *State v. Bates,* 202 N.J.Super. 416, 495 A.2d 422 (1985). We reach the same conclusion here. Forearms possess no reasonable expectation of privacy. They are routinely exposed to public view as are other parts of the body. Had the appellant not been assigned to a flying unit, he might very well have worn a short sleeve uniform shirt to perform his military duties. *See United States v. Murphree,* 497 F.2d 395 (9th Cir.1974).

Before further discussion in this area, it is well to remember that, subject to the qualification that they must be consistent with the U.C.M.J. and the United States Constitution, the publication of new rules to proscribe the mode of proof before courts-martial is within the authority of the President. Article 36, U.C.M.J.; *United States v. Gladwin,* 14 U.S.C.M.A. 428, 34 C.M.R. 208 (1964). The promulgation of the Military Rules of Evidence in 1980 was a proper exercise of such authority. See E.O. 12233, 1 September 1980; *Sec. and Law Enforcement Emp., Dist. C. v. Carey,* 737 F.2d 187 (2d Cir.1984).

Accordingly, we conclude that requiring the appellant to display his body to police was not a search under the

Fourth Amendment, but a visual examination that is permitted by Mil.R.Evid. 312. The actions of the officers were minimally intrusive in an area where the appellant had no reasonable expectation of privacy. *See United States v. Ferri,* 778 F.2d 985 (3rd Cir.1985); *see generally United States v. Palmer,* 575 F.2d 721 (9th Cir.1978); *United States v. Murphree, supra.*

Interwoven with his challenge that requiring him to display his forearms was a search, the appellant also urges that accepting, *arguendo,* that body views are a lesser intrusion than a search, the police were still prohibited from taking the action they did. His argument is this regard is two-fold: (1) no probable cause existed for law enforcement officers to "detain" him at OSI headquarters, and (2) his status while there was as a "detainee" not someone who had been apprehended for the commission of a crime. Appellate defense counsel remind us that involuntary visual examinations under Rule 312(b) are allowed only in conjunction with searches incident to a lawful apprehension under Mil.R.Evid. 314(g).

[2-4] Discussing the second assertion first, a determination as to whether an apprehension has been effected involves substance rather than form. No specific words or any words at all need be used. All that is required is the individual's freedom of locomotion be curtailed and this is communicated to him. *United States v. Horst,* 17 M.J. 796 (A.F.C.M.R.1983); *United States v. McCutchins,* 37 C.M.R. 678 (A.C.M.R.1967). Applying this criteria to the facts at hand, we have no hesitation in concluding that the appellant was in fact apprehended. He was transported to the OSI office in the company of two investigators; given codal warnings and advised as to the right to counsel and placed in a room where others could come and go but he could not. An apprehension is the equivalent of an arrest and occurs when, in view of all the circumstances surrounding the situation, a reasonable person would have

believed he was not free to leave. R.C.M. 302; *United States v. Spencer,* 11 M.J. 539 (A.C.M.R.1981). The facts clearly support the conclusion that the appellant had been apprehended when the visual examination of his forearms was accomplished.

[5, 6] We also conclude that ample probable cause existed to apprehend the appellant. The investigators had in their possession information that an individual meeting the appellant's description, i.e., height, build, hair and wearing a military uniform and driving a car that matched his in color, model and state tages were seen entering the residence of a known drug dealer. A subsequent search of the dealer's house disclosed heroin packaged for sale and related drug paraphernalia. The test for probable cause to apprehend a suspect *is not* proof beyond a reasonable doubt, but information which would lead a reasonable, cautious and prudent police officer to believe an offense has been or is being committed. *United States v. Horst, supra.* In our view, the investigators possessed such information.

[7] Having determined that the apprehension was based on probable cause, we now turn to the non-consensual extraction of the appellant's urine and blood. Rule 312(d) permits such extraction pursuant to a search authorization which the appellant at trial conceded was obtained. Mil.R.Evid. 315. He did not challenge the search authorization for lack of probable cause. *See* Mil.R.Evid. 311(a)(1).

[8, 9] Finally, the appellant maintains that forcing him to completely disrobe after needle marks were observed on his arms and ignoring his repeated requests for counsel tainted the later taking of his urine and blood specimens. We find no fault with the investigators continuing their visual examination of the appellant's body after the discovery of needle marks. Such a procedure is within the intent and purpose of Rule 312, and there is no require-

ment that medical personnel be present at the time. *People v. Green,* 52 Ill.App.3d 636, 10 Ill.Dec. 452, 367 N.E.2d 1061 (1977). Further, the appellant is not entitled to have counsel present during the visual examination of his body. He was not being interrogated and he made no "statement" within the meaning of either the Fifth Amendment or Article 31 of the Code. *See United States v. Rushing,* 17 U.S.C.M.A. 298, 38 C.M.R. 97 (1967); see also *United States v. Roa,* 20 M.J. 867 (A.F.C.M.R.1985). This is not the situation discussed in *United States v. Goodson,* 22 M.J. 22 (C.M.A.1986), wherein an accused repeatedly asked for counsel, was ignored and later gave a statement that was used at trial. The trial judge properly denied the motion to suppress the evidence obtained from the body view.

III

[10] Appellate defense counsel contend that their client's conviction cannot stand because the appellate record when received by us did not contain a written pretrial advice prepared by the staff judge advocate. R.C.M. 406(a). During oral argument we questioned appellate government counsel concerning this irregularity. We opined that the advice, if accomplished, should have been attached to the record. R.C.M. 1103(b)(3)(A)(ii). By motion, which we grant, the goverment offers the written pretrial advice submitted by the staff judge advocate to the convening authority. It is clear that the latter officer had this document to review prior to referring the offense to trial by general court-martial. The record of trial was not properly assembled initially, but this administrative error did not prejudice the appellant.

[11] We have reviewed the evidence in this trial and are convinced beyond a reasonable doubt of the appellant's guilt. Article 66(c), U.C.M.J. For the reasons stated, the findings of guilty and the sentence are

AFFIRMED.

Senor Judge FORAY and Judge MICHALSKI concur.

U.S. GOVERNMENT PRINTING OFFICE: 1987 – 202-037/62003

No. 87-643

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a visual examination of petitioner's forearms for needle marks based on information linking petitioner to heroin use was an unreasonable search.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-643

HAROLD U. REPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 447. The opinion of the Air Force Court of Military Review (Pet. App. 3a-11a) is reported at 23 M.J. 589.

JURISDICTION

The judgment of the Court of Military Appeals (Pet. App. 1a) was entered on July 22, 1987. On September 14, 1987, the Chief Justice extended the time to file a petition for a writ of certiorari to and

including October 20, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at George Air Force Base in California, petitioner, a member of the United States Air Force, was convicted of the wrongful use of heroin, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to three years' confinement, forfeiture of $2,300 per month for three years, and dismissal from the service. The convening authority reduced the forfeitures, but otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and sentences (Pet. App. 3a-11a). The Court of Military Appeals, after initially denying discretionary review (*id.* at 2a), granted petitioner's motion for reconsideration and summarily affirmed (*id.* at 1a).

1. As summarized by the Air Force Court of Military Review (Pet. App. 4a-6a), the evidence at trial showed that on March 1, 1985, civilian law enforcement officers were conducting a "stake-out" of the residence of Steve Collins, a known heroin addict who was suspected of being a heroin dealer (Tr. 224-225). While the police were watching the house, eight to ten individuals, some of whom were recognized as heroin users, arrived and left shortly after completing a transaction of some type (Tr. 230, 233). Later that day, between noon and 1 p.m., a red Corvette with an Oregon license plate arrived driven by an individual described as being six feet, two inches tall, with sandy brown hair, and wearing a green military uniform, a "jump suit with color-

ful patches on the shoulders" (Tr. 234). The individual exited the car, approached the door in the same fashion as had the prior visitors, and called out Collins's name (Tr. 238, 247). The individual stayed a short time, then returned to his car and drove off at a high rate of speed (Tr. 235, 247). Shortly thereafter, a warrant was obtained to search Collins's residence. Twenty-seven "balloons" of heroin were discovered, together with several syringes, a quantity of methamphetamines, and $6,000 in cash (Tr. 235, 237-238, 248-252).

Three days later, the civilian police reported their observations to investigators at nearby George Air Force Base (Tr. 238, 263). A search of flightline parking lots located a car matching the Corvette's description, and a subsequent check of the car's registration traced the car to petitioner, an officer assigned to the 21st Tactical Fighter Training Squadron (Tr. 263, 265). The next day, petitioner was escorted from the squadron lounge to the Office of Special Investigations (OSI) (Tr. 33). There, he was informed that there was probable cause to suspect him of narcotics offenses, and he was advised of his rights to remain silent and to the advice of counsel, which he asserted (Tr. 35-36, 44).[1] Petitioner was then asked to remove his flight jacket and the

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[1] Relying on these facts, the Air Force Court of Military Review held (Pet. App. 8a) that petitioner at this point was under "apprehension," the military equivalent of a civilian arrest (see Art. 7(a), UCMJ, 10 U.S.C. 807(a)), since it was clear at that point that petitioner was not free to leave. Apparently because petitioner was not formally placed under apprehension until late that evening, the parties at trial referred to the initial restriction as a "detention," rather than an apprehension (Tr. 25, 30, 69).

top portion of his flight suit so that his forearms could be viewed for puncture marks (Tr. 34-35). Petitioner complied under protest (Tr. 37, 44), and the ensuing visual examination disclosed what appeared to be 10 to 15 puncture marks on each arm, some of which appeared to be fairly recent (Tr. 36, 38, 44).[2] At that point he was asked to disrobe completely, and his entire body was examined and photographed. A subsequent physical examination by a physician at the base hospital disclosed approximately 10 puncture marks on petitioner's forearms and hands, and one on his right ankle. Those marks were consistent with the marks caused by a hypodermic needle (Tr. 282-284). That evening, pursuant to a search authorization,[3] petitioner was required to submit blood and urine samples. Laboratory tests on each specimen revealed the presence of opiates (Pet. App. 6a).

2. Before entering his plea, petitioner moved to suppress the test results on the ground that they were derived from a "body view" that did not comply with Mil. R. Evid. 312(b)(2) (Tr. 14). Petitioner did not challenge the legality of his seizure by the au-

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[2] The examination occurred in a private office with the door closed. Petitioner was alone in the room with the investigator who conducted the examination (Tr. 43, 44). While petitioner maintained that his flight suit dropped all the way to the floor (Tr. 50), the investigator testified that petitioner at that point was not asked to remove the flight suit below the waist (Tr. 36). In any case, it was undisputed that petitioner was still dressed in underwear and a tee-shirt.

[3] A "search authorization" is the military version of a search warrant. It may be issued upon probable cause only by impartial commanders, military judges, or magistrates authorized by regulation to order a search. Mil. R. Evid. 315(d).

thorities. After hearing testimony and argument, the trial judge denied the motion (Tr. 72).

ARGUMENT

Petitioner challenges the means by which the evidence of his heroin use was discovered. He contends that the visual examination of his forearms violated the Fourth Amendment and that it could not be justified as a search incident to arrest.

1. First, the visual examination of petitioner's arms was justified because it occurred incident to his arrest. See generally *United States* v. *Robinson*, 414 U.S. 218 (1973). In addition to the evidence presented during the government's case-in-chief, upon which the court of military review relied in finding probable cause to apprehend petitioner (Pet. App. 9a), there was sworn testimony at the pretrial Article 32 investigation,[4] which showed that the military investigators possessed significant additional information linking petitioner to involvement with heroin.[5]

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[4] Article 32(a), UCMJ, 10 U.S.C. 832(a), requires that any charge or specification referred to a general court-martial for trial must first undergo a "thorough and impartial investigation."

[5] An OSI agent Roberson testified at the Article 32 proceeding that approximately two or three weeks before petitioner's apprehension, the OSI possessed information from two sources that a Captain named "Rick" who drove a red sports car was dealing in heroin. One of the sources claimed to be the sister of a woman named "Ginger" to whom "Rick" had allegedly provided heroin. After the red Corvette was found on March 4, 1985, and identified as petitioner's, but before petitioner was escorted to the OSI office, a review of his personnel records revealed that he was known by the nickname "Rick." Agent Roberson then spoke with the father of the civilian heroin

The evidence therefore supports the military courts' conclusion that there was probable cause to apprehend petitioner for the use of heroin. Because petitioner had been lawfully arrested at the time of the viewing of his forearms, that viewing—even if regarded as a "search"—was a lawful search incident to his arrest, authorized by Mil. R. Evid. 312(b)(2).

2. In the alternative, the viewing of petitioner's forearms can be upheld because it did not constitute a "search" within the meaning of the Fourth Amendment. The court of military review determined that the inspection of petitioner's forearms did not intrude upon petitioner's legitimate expectation of privacy. That ruling is fully consistent with the decisions of the federal and state courts that have addressed the Fourth Amendment implications of a visual examination of the forearms or similar parts of the body.[6]

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dealer, who advised the agent that he had seen a tall, slender sandy-haired white male from George Air Force Base driving a Corvette visit his son on three or four occasions, sometimes in the company of a woman named "Ginger." He believed this white male was called "Rick" (see 1 R. (Article 32 Investigating Officer's Exh. 5)).

[6] *E.g.*, *United States* v. *Ferri*, 778 F.2d 985, 996 (3d Cir. 1985), cert. denied, 476 U.S. 1172 (1986) (production of bare feet for ink printing not a search); *United States* v. *Thomas*, 729 F.2d 120, 123-124 (2d Cir.), cert. denied, 469 U.S. 846 (1984) (parole officer's order to parolee to roll up his sleeves to examine his forearms not a search); *Hall* v. *Iowa*, 705 F.2d 283, 292 (8th Cir.), cert. denied, 464 U.S. 934 (1983) (examination of hands and arms not a search); *In re Grand Jury Proceedings*, 686 F.2d 135, 139 (3d Cir.), cert. denied, 459 U.S. 1020 (1982) (taking hair samples not a search); *United States* v. *Murphree*, 497 F.2d 395, 396-397 (9th Cir.), cert. denied, 419 U.S. 863 (1974) (customs inspector's order to de-

The decisions cited by petitioner are not to the contrary; none of those cases held that the visal inspection of a person's forearms amounts to a search.[7]

The examination at issue here consisted of a visual inspection of the surface of petitioner's forearms, conducted in a private room at a time when petitioner

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fendant to roll up his sleeves to examine his arms not a "strip search" for which a reasonable suspicion is required); *United States* v. *Richardson*, 388 F.2d 842, 845 (6th Cir. 1968) (examination of hands under ultraviolet light not a search); *Williams* v. *City of Lancaster*, 639 F.Supp. 377, 381-382 (E.D. Pa. 1986) (same); *Commonwealth* v. *Stickle*, 484 Pa. 89, 104, 398 A.2d 957, 966 (1979) (visual examination of suspect's forearms to determine age of burn marks not a search); *Strickland* v. *State*, 247 Ga. 219, 224-225, 275 S.E.2d 29, 36, cert. denied, 454 U.S. 882 (1981) (swabbing suspect's hands for gunshot residue not a search or seizure).

[7] The language from *State* v. *Brown*, 25 Wis. 2d 413, 415, 130 N.W.2d 760, 763 (1964), quoted by petitioner (Pet. 16) is dictum, because no Fourth Amendment issue was presented in that case. *People* v. *Ferguson*, 214 Cal. App. 2d 772, 29 Cal. Rptr. 691 (1963), did not rule that the observation of needle marks on a suspect's arms is a search. The question there was whether observation of needle marks on a person's arms by itself gives rise to probable cause to arrest a person for the possession of narcotics. Neither *United States* v. *Medina-Flores*, 477 F.2d 225 (10th Cir. 1973), nor *Marsh* v. *United States*, 344 F.2d 317 (5th Cir. 1965), resolved the question whether visual observation of a needle mark on the suspect's arms was a search. Finally, while *United States* v. *Kenaan*, 496 F.2d 181 (1st Cir. 1974), held that the examination of a person's hands under ultraviolet light was a search, that decision, which did not arise in a military setting, was issued before this Court held in *Texas* v. *Brown*, 460 U.S. 730 (1983), that the use of a flashlight to illuminate a darkened area is not a search. See also *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986) (use of sophisticated photographic equipment does not amount to a search).

was at least partially clothed. Petitioner was required only to display his arms to the investigator; he was not required to speak or otherwise provide evidence. Accordingly, petitioner's privacy claim is limited to a purely visual examination of his forearms, which are parts of one's anatomy that are routinely exposed to the public, even if they were not exposed by petitioner on that particular day. Such an examination is not nearly as intrusive as actual invasions into the body, such as the extraction of blood (see *Schmerber* v. *California*, 384 U.S. 757 (1966)), or body cavity searches (see *Bell* v. *Wolfish*, 441 U.S. 520 (1979)). Nor is it as intrusive as scraping one's fingernails for evidence (see *Cupp* v. *Murphy*, 412 U.S. 291 (1973)) or the experience of being stopped and frisked by a police officer on a public street (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Rather, the intrusion occasioned by a simple visual examination of one's forearms in a private room is not materially different from the minimal intrusion entailed by fingerprinting (see *Davis* v. *Mississippi*, 394 U.S. 721 (1969)), or by the compelled production of voice and handwriting samples (see *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973)), none of which entail significant inroads upon privacy.

Moreover, petitioner's expectation of privacy in the outward appearance of his forearms must be gauged by the military context in which this case arose. Two factors bear on this point. First, unlike civilian society, where clothing decisions are generally left to personal choices and individual tastes, the military strictly regulates the clothing servicemembers may wear. *Goldman* v. *Weinberger*, 475 U.S. 503 (1986). Such uniform requirements substantially reduce a

servicemember's expectation of privacy in those parts of his body, such as hands and forearms, which a particular uniform exposes to view.[8] Second, the military requirements of obedience, discipline, and readiness necessarily limit the legitimate expectations of privacy of servicemembers. The military is a separate, distinct society. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). As members of that society, servicemembers commonly experience restrictions on their privacy that are foreign to ordinary citizens.[9] In these cir-

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[8] The applicable Air Force regulation is A.F. Reg. 35-10, *Dress and Personal Appearance of Air Force Personnel* (Sept. 15, 1983). Among the uniforms authorized for wear are various short-sleeved shirts or blouses for men and women. Of course, as petitioner points out (Pet. 15), various long-sleeved uniforms are authorized and appropriate as well. But that misses the point, which is that even though a particular uniform is authorized, few if any servicemembers would question a commander's authority to specify an authorized uniform as a requirement for a particular function. Mission requirements can also dictate the uniform. Thus, a servicemember's uniform is based less on truly "personal choice" than on the orders of superiors and the dictates of mission requirements. Inasmuch as those orders or mission requirements could dictate at any time a uniform leaving forearms exposed, few people in the military would accept a claim of privacy in the outward appearance of one's forearms.

[9] Notable examples include the traditional military health, welfare, and readiness inspection (*United States* v. *Middleton*, 10 M.J. 123 (C.M.A. 1981); Mil. R. Evid. 313), and searches at base perimeters (*United States* v. *Alleyne*, 13 M.J. 331 (C.M.A. 1982)). One member of the Court of Military Appeals has also suggested that, because of these routine inroads into privacy in the military, service-members can claim little or no reasonable expectation of privacy in their barracks rooms. *United States* v. *Moore*, 23 M.J. 295, 300 (C.M.A. 1987) (Cox, J., concurring).

cumstances, we submit that a serviceman has no reasonable expectation of privacy in the outward appearance of his forearms.

In *United States* v. *Thomas*, 729 F.2d 120 (2d Cir.), cert. denied, 469 U.S. 846 (1984), the court upheld a parole officer's warrantless examination of a parolee's forearms without probable cause on the ground that the conditions and restrictions on a parolee's lifestyle necessarily reduced his reasonable expectation of privacy respecting his parole officer. *Id.* at 123-124.[10] While there are obvious differences between servicemembers and parolees, *Thomas* provides a helpful analogy, because servicemembers' expectations of privacy are similarly reduced due to the unique nature of the military environment.[11] Under

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[10] Contrary to petitioner's characterization of *Thomas* (Pet. 16 n.25), there was no "implied consent" to search. Rather, certain statements made by Thomas suggested to the court that he had no real subjective expectation of privacy in his forearms. 729 F.2d at 123; see *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979). The facts of this case also suggest that petitioner manifested no subjective expectation of privacy in his bare forearms. In the first place, his wearing a long-sleeved flight suit merely evinces compliance with the uniform requirement for flying duties, rather than an intent to shield his forearms from view. Also, petitioner himself acknowledged owning and wearing a short-sleeved uniform shirt. He claimed no embarrassment from showing his forearms, and he acknowledged that he could be required to wear a short-sleeved uniform shirt (Tr. 56-57). He also acknowledged situations when he had been in the presence of other male Air Force members clad only in his underwear, and he did not consider such a situation unusual (Tr. 60).

[11] Other courts have upheld strip searches of police officers on less than probable cause on the ground that the public interest in police integrity may justify the requirement of the lesser standard of "reasonable suspicion." *E.g.*, *Kirkpatrick*

these circumstances, the intrusion at issue in this case was so minimal that it did not violate petitioner's rights under the Fourth Amendment even if petitioner was not lawfully under apprehension at the time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v. *City of Los Angeles*, 803 F.2d 485, 488-490 (9th Cir. 1986). Similarly, strip searches of correctional employees may be justified by a reasonable suspicion rather than probable cause, due to the strong governmental interest in maintaining security in correctional facilities. *E.g., Security & Law Enforcement Employees* v. *Carey*, 737 F.2d 187 (2d Cir. 1984); see *Hunter* v. *Auger*, 672 F.2d 668 (8th Cir. 1982) (same rule for visitors to prison inmates).

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No. 87-643

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONER'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

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ARGUMENT

Although respondent's opposition never acknowledges the point, the government had the burden of proving by a preponderance of the evidence that petitioner's expectation of privacy in his forearms is one society is unprepared to accept as reasonable.[1] That is a heavy burden where, as here, the part of the body in question is not one that is "constantly exposed to the public."[2]

1. Predictably,[3] respondent stresses that the military is a separate society. It fails, however, to show how that justifies the result *in this case.* Its claim rests on two notions: first, that clothing is carefully regulated in the mili-

[1] Mil. R. Evid. 311(e)(1), MCM, 1984, at III-9, provides that when a motion to suppress or objection has been made, "the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure." The rule is the same as the civilian rule. *See* Analysis of the 1980 Amendments to the Manual for Courts-Martial, MCM, 1984, at A22-16, *citing Lego v. Twomey*, 404 U.S. 477 (1972).

[2] *See United States v. Dionisio*, 410 U.S. 1, 14 (1973), *quoted in Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

[3] *See* Pet. 10 & n.6.

tary, and second, that "the military requirements of obedience, discipline, and readiness necessarily limit the legitimate expectations of privacy of servicemembers." Opp. at 8-9.

a. This argument misconceives the issue, which is in no way peculiar to the military. Reasonableness must be tested by the clothing actually worn, and the individual's military or civilian status is immaterial. But even if military status were relevant, respondent does not contest the fact that petitioner's apparel was proper and lawfully worn in accordance with the pertinent uniform regulations. As a result, *Goldman v. Weinberger*, 475 U.S. 503 (1986), if anything, supports our case. While Congress has now superseded *Goldman*,[4] it is plain that a generally deferential approach to military matters survives, which in the context of this case requires recognition of the fact that petitioner's long-sleeved garment was in conformity with service requirements. Hence, even if it were proper to look past the simple fact of what petitioner was actually wearing, it is impossible, to conclude that his apparel was anything other than objectively reasonable and therefore entitled to Fourth Amendment protection.

b. As to respondent's sweeping claim based on "military requirements of obedience, discipline, and readiness," we can only say that it has failed to show how these broad interests dictate a result any different from what would have obtained if petitioner had been a civilian. The flightsuit was in accordance with regulations; its wearing involved no breach of discipline.[5] It is instructive that

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[4] National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019. For floor debate on the provision see 133 Cong. Rec. S12791-801 (daily ed. Sept. 25, 1987).

[5] Uniform regulations are general orders violation of which is punishable by court-martial. UCMJ Art. 92(1), 10 U.S.C. § 892(1) (1982).

neither the trial judge (a military officer), R. 72, nor the military officers serving as appellate military judges on the Court of Military Review, Pet. App. 6a-8a, rested their determinations on these kinds of considerations, the latter court turning instead to a variety of civilian precedents from the state and federal courts.

2. The government also failed to carry its burden regarding petitioner's subjective expectation of privacy. It may claim that "petitioner manifested no subjective expectation of privacy in his bare forearms," Opp. at 10 n.10, but what an individual actually wears is the best evidence of his or her expectation of privacy of the body. People who wear long-sleeved garments need not carry a little card in their wallet (like those the police carry to help remember the *Miranda* warnings) or wear the legal equivalent of a "Med-Alert" bracelet certifying that they do not expect the police to be able to force them, without warrant or probable cause, to display their clothed arms, in order to protect against later being found to have had no subjective expectation of privacy.

3. In addition to erroneously implying that the burden lay on petitioner to prove that he had manifested his privacy expectations, respondent's assertion that petitioner did nothing to manifest his expectation of privacy is factually incorrect. No evidence was offered to suggest that petitioner was wearing the flightsuit against his will. What evidence there was showed that petitioner objected to being forced to display his clothed forearms. R. 37, 44. That objection, in addition to evincing a lack of consent to the search, was a demonstration of his privacy expectations and understanding of his rights. His mere ownership of short-sleeved shirts (not worn at the time of the search) or his lack of embarrassment (at times not relevant to the search) when wearing underwear among other males similarly clad[6] are simply not probative on the question of

[6] *See* Opp. at 10 n.10.

his personal, subjective expectation of privacy of his clothed forearms on the day and in the circumstances of the search.[7] That respondent would refer to these facts simply confirms our submission[8] that it, like the courts below, has mistaken *modesty* for *privacy*.

4. The government's opposition stresses that the search of petitioner's forearms occurred "in a *private* office with the door closed," Opp. at 4 n.2 (emphasis added); *see also id.* at 7, as if to imply that a Fourth Amendment violation may be forgiven if committed behind closed doors. To describe the room as "private" is misleading and misconceives the issue. The "private room" was an office

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[7] Respondent has quarreled with our parenthetical summary of *United States v. Thomas*, 729 F.2d 120 (2d Cir.), *cert. denied*, 469 U.S. 846 (1984). *Compare* Pet. 16 n.25 *with* Opp. 10 n.10. Although Judge Meskill's opinion notes that the conditions of Thomas's parole "included consent to searches and inspections of his person and property by his parole officer," 729 F.2d at 123, this appears to have been mentioned not to show that the search was consented to, but rather for the point that Thomas has no subjective expectation of privacy in his forearms. *See id.* at 124-25 (Oakes, J., dissenting on other grounds). The majority also found that Thomas's expectation of privacy in his forearms was not objectively reasonable. *Id.* at 123-24. *Thomas*, however, is of no benefit to respondent since, whereas Thomas stated "I knew you were going to do that" when the parole officer told him to roll up his sleeves, *id.* at 123, petitioner made no such statement, and, as indicated in the text, there is no other basis on which to find that his subjective expectation of privacy was diminished.

This brief would be incomplete if it did not register a vigorous objection to the notion, Opp. at 10-11 & n.11, that for Fourth Amendment purposes military personnel whose task it is to *protect* our national liberties stand on an equal footing with paroled convicts. It is difficult to imagine an analogy that is at once more ironic, more insulting to those in service, or better calculated to discourage enlistments in this conscriptionless era.

[8] Pet. at 15, 19.

used by the Office of Special Investigations ("OSI"). The only sense in which it could be called "private" is that persons other than those involved in law enforcement presumably would not have been allowed in; any privacy interest would have been OSI's. Of course, keeping the door closed would reduce the embarrassment to petitioner from what it would have been if he had been forced to disrobe in a public place. But the fact that strangers to the law enforcement function could not observe what was bring done to petitioner scarcely excuses the injury to his privacy interest,[9] which OSI was violating just as much as if the Fourth Amendment violation had occurred at the intersection of Connecticut Avenue and K Street at noon on a workday. In other words, even if OSI's "private room" was intended as a sop to petitioner's modesty,[10] it was meaningless as a recognition of his Fourth Amendment rights.[11]

5. In an effort to breathe life into the Court of Military Review's stillborn conclusion that this was a search incident to an arrest, respondent now suggests that "petitioner was not formally placed under apprehension[12] until late" on the evening after the fore-

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[9] *See Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489-90 (9th Cir. 1986).

[10] To be realistic, it may also have been simply an OSI ploy to construct an environment in which the target's aloneness was underscored in hopes of eliciting his consent to a search that might otherwise have been resisted. If so, it failed; petitioner never consented.

[11] That OSI conducted this search in secret, rather than in a public place, makes it all the more disquieting from the standpoint of protecting citizens from police state tactics. The "knock on the door" is offensive because it typically comes in the dark of night, when disinterested persons who could bear witness to governmental illegality are unlikely to be present. Likewise, the chief evil associated with the Star Chamber was its secrecy.

[12] "Apprehension" is the military law term for "arrest." Pet. at 9 n.2.

arm search, Opp. at 3 n.1, implying—by use of the word "formally"—that an apprehension within the meaning of the Uniform Code of Military Justice had actually occurred some time earlier. This position constitutes a repudiation of the government's representations at trial,[13] and the Court should not permit itself to be thus lulled into thinking that the repeated descriptions of petitioner's status at the time of the forearm search as "detention" reflected merely looseness in terminology,[14] or that his *subsequent* "apprehension" was merely a needless ritual confirming a milepost that had already been passed. Both sides to this case were ably represented by lawyers at trial, and their careful, repeated references (as well as those of the experienced law enforcement personnel who equally carefully tailored their testimony) to *detention*, rather than *apprehension*, were no accident. Plainly, an arrest that did not occur until many hours later, and was overwhelmingly predicated on the fruits of the several levels of illegal search,[15] cannot be given effect *nunc pro tunc* so as to legitimize as incident to arrest a search occuring before arrest.

6. Finally, respondent's remarkable attempt to bolster its case with matter not adduced at trial, but rather at a pretrial investigation,[16] is entirely improper. The exhibit

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[13] *See Pet. at 20, citing* R. 29 (prosecutor's expressed "total agreement" with defense counsel's proffer, subject to exceptions not here relevant), 31 (prosecutor's description of parties' positions as a "stipulation"). A change of signals such as this is a denial of due process because petitioner has not been afforded an opportunity to present evidence to meet the government's new theory. A remand for this purpose should not be permitted because the government has shown no basis for excusing it from the strategic choices the prosecutor made at trial.

[14] *See* Pet. at 20 (collecting record references).

[15] *See id.* at 12 (Steps 3-7).

[16] Opp. at 5 & n.5.

on which respondent now relies is a summary of testimony during an "Article 32 investigation."[17] The paraphrased testimony was neither given or offered at trial, and the summary itself is merely an attachment to the record.[18] Under Rule 804(b)(1) of the Military Rules of Evidence, testimony from a pretrial investigation cannot be used at trial unless (a) the witness is unavailable and (b) the prior testimony has been recorded verbatim. The summary referred to in footnote 5 of respondent's opposition meets neither of these two requirements.[19] It is far too late for the government now to be adding matter that was not placed in evidence before the military judge. *United States v. Glass*, 744 F.2d 461 (5th Cir. 1984) (per curiam) (refusing to take judicial notice of DEA agent's search warrant affidavit that was never before district court during sup-

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[17] 10 U.S.C. § 832 (1982). The exclusionary provisions of the Military Rules of Evidence do not apply to such investigations. M.R.E. 1101(d); R.C.M. 405(i). The investigating officer may inquire into the legality of a search, and is encouraged to note problems of admissibility in his report, but is not required to consider such matters except as he or she deems necessary to an informed recommendation. R.C.M. 405(e) (Discussion). An investigating officer cannot enter a binding suppression order.

[18] *England v. Gebhardt*, 112 U.S. 502, 506 (1884). The difference is critical. Under R.C.M. 1103(d)(3)(A)(i), a report of investigation is "attached" to the record of trial if it is *not* used as a trial exhibit. The report in this case is an exhibit only to the investigating officer's report to the convening authority; it was not an exhibit at trial. Such documents are referred to as "allied papers," *see United States v. Buswell*, 22 M.J. 617, 619 n.5 (A.C.M.R. 1986) (per curiam), and are attached merely to demonstrate procedural regularity. R.C.M. 1103 carefully distinguishes between the "contents" of the record of trial (subparagraph (b)(2)) and "[m]atters *attached to* the record" (subparagraph (b)(3)) (emphasis added).

[19] Special Agent Roberson was obviously not unavailable; he testified at trial. R. 99-131.

pression hearing); *see also United States v. Donsky*, 825 F.2d 746, 749 (3d Cir. 1987).[20]

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[20] Cf. *Stone v. Powell*, 428 U.S. 465, 473 n.3 (1976); *Spinelli v. United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964) ("[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention") (emphasis in original). The Court of Military Appeals has correctly held that, over objection, matter from an Article 32 investigation may not be relied on to an accused's detriment *Compare, e.g., United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976), with *United States v. Talavera*, 8 M.J. 14, 17-18 (C.M.A. 1979); *see also McDonald v. United States*, 205 Ct. Cl. 780, 507 F.2d 1271, 1274-76 (1974) ("only way" Art. 32 report may be used by Court of Military Review "is to provide mitigating information for sentence reduction purposes"). Since this is the first time the government has attempted to rely on the summarized investigative testimony to petitioner's detriment, this reply brief represents petitioner's first opportunity to object, which he hereby does. In any event, the new matter belatedly relied on by respondent, along with the evidence that was put before the trial court, still would not amount to probable cause to arrest petitioner. *See generally* Pet. at 19-21. If it did, the prosecutor would have so argued to the proper time, *i.e.*, the suppression hearing at trial.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

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